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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY JOHN FOSTER,

Defendant and Appellant.

D071733

(Super. Ct. No. SCD204096)

APPEAL from an order of the Superior Court of San Diego County, David J.

Danielson, Judge. Affirmed.

Michelle D. Peña, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Randall Einhorn and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Jeremy John Foster appeals from an order denying his motion to dismiss his civil commitment as a mentally disordered offender (MDO). Foster's commitment began

after he completed serving his prison sentence for a felony theft offense. In late 2016 Foster successfully petitioned to have his underlying offense redesignated as a misdemeanor pursuant to The Safe Neighborhoods and Schools Act, Penal Code section 1170.18,<sup>1</sup> which became effective after the voters approved Proposition 47 in 2014. Foster's "motion to dismiss" argued that the redesignation of his original offense as a misdemeanor means that he no longer meets the criteria for a commitment as an MDO, and, therefore, he was entitled to be released.

On appeal, Foster renews his argument. This court recently considered and rejected an identical argument in *People v. Goodrich* (2017) 7 Cal.App.5th 699 (*Goodrich*). We see no reason to depart from the reasoning in *Goodrich*. Additionally, we disagree with Foster's contention that the trial court's decision violates the equal protection clause because it results in the disparate treatment of different classes of civil committees. Accordingly, we affirm the trial court's order denying Foster's motion to dismiss his commitment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In August 2007 Foster pled guilty to grand theft of a person, in violation of section 487, subdivision (c), a felony offense. The court sentenced Foster to a determinate term of 16 months in prison. After completing his sentence and then being civilly committed in a state hospital for several years as an MDO, Foster was released in October 2014

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

under an outpatient program. His outpatient status as an MDO has been renewed annually.

"In November 2014, voters approved Proposition 47, 'the Safe Neighborhoods and Schools Act,' which became effective on the day after its passage." (*Goodrich, supra*, 7 Cal.App.5th at p. 705.) "Among other things, Proposition 47 added section 1170.18, which permits individuals to petition the trial court to redesignate certain felony offenses as misdemeanors." (*Ibid.*)

Pursuant to section 1170.18, Foster petitioned to have his felony theft conviction redesignated as a misdemeanor. The People did not oppose the petition and the court granted the petition on October 27, 2016.

Thereafter, Foster moved to dismiss his MDO commitment. He argued that the redesignation of his theft conviction as a misdemeanor meant it was no longer a qualifying offense, a necessary precondition to his commitment as an MDO. After continuing the hearing on Foster's motion to dismiss to await finality of this court's decision in *Goodrich*, the trial court denied the motion and recommitted Foster as an MDO to the outpatient program. Foster submitted on the reports recommending the renewal of his outpatient status, waiving his rights other than the right to appeal the court's ruling on his motion to dismiss.

## DISCUSSION

### I

Foster's appeal is largely premised on a single, narrow issue: whether the redesignation of his original offense as a misdemeanor means that he no longer meets the

criteria for an MDO commitment. This precise issue was considered by a panel of this court in *Goodrich*, *supra*, 7 Cal.App.5th 699.

In *Goodrich*, this court held that the redesignation of an offense under Proposition 47 does not preclude a recommitment as an MDO. As we explained, an initial MDO commitment is governed by section 2962, which sets forth six criteria necessary to establish an individual's MDO status. (*Goodrich*, *supra*, 7 Cal.App.5th at p. 706.) One criterion is that the individual was sentenced to prison for an enumerated crime, which qualifies only if the defendant "received a determinate sentence pursuant to Section 1170 for the crime." (§ 2962, subds. (b), (e)(1).) In other words, the qualifying offense must be a felony.

This criterion, along with two others, is described as a "static" or "foundational" factor. (*Goodrich*, *supra*, 7 Cal.App.5th at p. 708.) After the initial commitment, if the People are seeking a recommitment after the expiration of the one-year term, only the existence of the other three criteria (i.e., that the offender suffers from a severe mental disorder, that the illness is not or cannot be kept in remission, and that the offender poses a risk of danger to others) must be established at the annual review. (*Id.* at pp. 707-708.)

Accordingly, a change in the committee's underlying offense is irrelevant after his or her initial commitment as an MDO. In *Goodrich*, this court concluded that "there is no requirement that the People present evidence to establish the existence of the three 'static' criteria (i.e., that the mental disorder was a cause of or an aggravating factor in an enumerated crime; that the individual was sentenced to prison for the crime; and that the individual had been in treatment for the disorder for 90 days or more in the year

preceding his or her release on parole) at a recommitment proceeding. Rather, once an individual has been determined to be an MDO and has been properly committed in an initial commitment proceeding, the only things that must be established in a recommitment proceeding are 'that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others.' (§ 2972, subd. (c).) Thus, at Goodrich's recommitment proceeding, the court was not required to consider whether Goodrich had served a sentence for any offense. Goodrich's current commitment is not predicated upon his felony conviction; rather, it is predicated on his current mental state and dangerousness. His prior felony conviction is not a factor bearing on his current recommitment. It is undisputed that, at the time he was initially committed as an MDO, he had suffered a felony conviction for which he served a sentence in prison and that the initial commitment was proper. Nothing about Proposition 47 changes this." (*Goodrich*, *supra*, 7 Cal.App.5th at pp. 710-711, italics omitted.) Additionally, we held that Proposition 47 does not apply retroactively to invalidate an initial MDO commitment. (*Ibid.*)

We discern no compelling reason to depart from *Goodrich*. (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598.) Although Foster is on outpatient status rather than committed to a state hospital, the requirements for the renewal of his outpatient status are identical to the recommitment procedures in all aspects relevant to any possible effect of

Proposition 47. (§ 2972.1, subds. (d) & (e).) Thus, the trial court correctly denied Foster's motion to dismiss the petition to renew his outpatient status.

## II

Foster also contends that the trial court's decision to not dismiss the recommitment proceeding violates his rights under the equal protection clause because he is similarly situated to civil committees under the Sexually Violent Predators (SVP) Act. To support his contention, Foster relies on *In re Franklin* (2008) 169 Cal.App.4th 386 (*Franklin*), which he believes determined that "commitment as SVP was not authorized after the underlying conviction was reduced from felony to misdemeanor on appeal."<sup>2</sup> As argued by Foster, if SVP and MDO committees are similarly situated and the government cannot demonstrate a compelling interest in their disparate treatment, release under the SVP Act following a reclassification of a felony offense to a misdemeanor would require a similar release under the MDO Act.

This argument, however, relies on a mistaken understanding of the SVP Act and the *Franklin* decision. Like the MDO Act, the SVP Act provides for an involuntary civil commitment based on a diagnosed mental disorder that contributed to a felony offense

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<sup>2</sup> Foster also relies upon *In re Smith* (2008) 42 Cal.4th 1251 to support his equal protection claim predicated on the differential treatment of MDOs and SVPs. *Smith*, however, involved the complete reversal of an SVP's underlying criminal conviction on appeal, after which the petitioner was not retried. Although the Supreme Court concluded in *Smith* that such a situation precludes further SVP commitment, that situation is entirely distinct from the situation presented here, where Foster's underlying criminal conviction is valid and final. The redesignation of his offense under Proposition 47 is not comparable to the situation in *Smith*, which is accordingly largely irrelevant to Foster's argument on appeal.

and that currently makes the person a danger to the health and safety of others. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1185-1186 [discussion of SVP procedures before passage of Proposition 83].) During the time period relevant to the *Franklin* decision upon which Foster relies, the SVP Act provided for an initial two-year term of commitment that could only be extended if the People petitioned for a recommitment for another two-year term. (*McKee*, at pp. 1185-1196.)

In *Franklin*, a civil committee under the SVP Act petitioned for a writ of habeas corpus seeking the dismissal of a pending petition for civil recommitment. Franklin's first two-year commitment as an SVP began in 2001 premised on a petition alleging two rape convictions, a voluntary manslaughter conviction, and a conviction for possession of a controlled substance in state prison. (*Franklin, supra*, 169 Cal.App.4th at p. 388.) In 2004, during his first recommitment term, he was convicted of another felony offense: willful and intentional damage to jail property in excess of \$400. (*Ibid.*) Apparently because he was sentenced to an indeterminate prison term under the Three Strikes Law, the People did not seek his recommitment as an SVP when his term lapsed in August 2005. (*Franklin*, at p. 391.) In 2006, however, the appellate court reversed Franklin's felony conviction for damaging jail property and the case was remanded for resentencing as a misdemeanor. (*Id.* at p. 389.)

Shortly thereafter, the prosecutor then filed a new petition for *recommitment* as an SVP while Franklin was in custody awaiting misdemeanor resentencing. (*Franklin, supra*, 169 Cal.App.4th at p. 390.) The appellate court, however, explained that because Franklin's civil commitment had lapsed, the People could not seek *recommitment*, but

rather would have to seek a new initial civil commitment. (*Id.* at pp. 391-392.) But because a person is lawfully subject to an SVP civil commitment only if the individual is in state prison custody either serving a determinate term prison sentence or whose parole has been revoked, Franklin could not be civilly committed. (*Id.* at p. 392.)

Thus, the decision in *Franklin* does not hold that the reclassification of a felony conviction as a misdemeanor precludes the recommitment of an SVP committee. Instead, it simply holds that an initial petition for commitment as an SVP must establish that the individual is currently incarcerated in prison for a felony offense. Accordingly, the *Franklin* decision is inapposite.

Setting aside *Franklin*, Foster is generally mistaken in relying on the redesignation of an underlying felony via Proposition 47 to preclude recommitment as an SVP to establish his equal protection claim. To be committed as an SVP, a person must have been convicted of a "sexually violent offense." (Welf. & Inst. Code, § 6600, subds. (a)(1), (b).) Proposition 47 expressly precludes relief for any person convicted of a "sexually violent offense" as defined by the SVP Act. (Pen. Code, §§ 1170.18, subd. (i), 667, subd. (e)(2)(C)(iv)(I).) Therefore, an SVP committee cannot have his or her underlying felony offense redesignated as a misdemeanor pursuant to Proposition 47.

Finally, Foster argues that applying Proposition 47 to preclude an MDO commitment for a person that commits grand theft of a person *after* Proposition 47's effective date, but allowing the recommitment of Foster, who was convicted of grand theft of a person before Proposition 47's effective date, also violates the equal



protection clause. In other words, he contends the unequal treatment of convicted defendants based on the date of their conviction is unconstitutional.

Disparate treatment based on the date of conviction is not made on the basis of race, alienage, national origin, gender or legitimacy, which all require a greater level of scrutiny. (See *People v. Mora* (2013) 214 Cal.App.4th 1477, 1483.) A statute that results in the disparate treatment of individuals based on their date of conviction by applying only prospectively is rationally related to a legitimate state interest and " ' the [Fourteenth] Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time. ' " (*Id.* at p. 1484, quoting *People v. Floyd* (2003) 31 Cal.4th 179, 191.)

For these reasons, Foster does not establish any violation of the equal protection clause warranting a reversal of the trial court's decision.

#### DISPOSITION

The order is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.